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No. 90-1859

In the Supreme Court of the United States

OCTOBER TERM, 1991

J.C. KEENEY,

Petitioner,

v.

JOSE TAMAYO-REYES,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

The parties' positions in this case reduce to two central points of disagreement: (1) did Congress codify the "deliberate by-pass" standard for determining when a federal habeas petitioner may demand an evidentiary hearing to develop material facts that were not developed in state court; (2) if Congress has not legislatively prescribed that standard, does it remain an appropriate standard for this Court to apply? While respondent's brief addresses these core points, it also incorporates a host of arguments that have no proper bearing on the question presented. It is helpful, therefore, to begin this reply by clarifying what is not at issue.

I.

A. The Interpreter's Translation of the Plea Petition and Plea Hearing Is Not at Issue.

Much of respondent's statement of the case is spent discussing what respondent perceives to be the interpreter's (Ben Sanchez') failure to translate the plea petition and the events at the plea hearing accurately. Respondent never explains the reason for his extensive focus on this factual point, but presumably the discussion is designed to bolster his later suggestion that he is innocent of any criminal conduct, Resp. Br. 55,[1] and to impugn the integrity of the state court proceedings as a whole. The simple answer to respondent's discussion, however, is that this claim has been fully adjudicated by both state and federal courts, respondent lost in both forums, and he no longer may view the evidence in the light most favorable to him. Instead, as the procedural posture of the case reveals, he must accept as conclusive the lower courts' determinations that the translation was, on whole, accurate and complete.

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[1]Citations to the Respondent's Brief are to the typewritten copy. The printed copy has not yet been prepared.

The factual dispute in both the state post-conviction and federal habeas proceedings centered on the adequacy of Ben Sanchez' translation. Respondent claimed his no-contest plea was not knowing or intelligent because Sanchez' translation was inadequate in two respects. First, he argued that Sanchez did not translate the mental element of manslaughter correctly. Second, and more generally, he argued that Sanchez did not adequately explain what was going on during the plea hearing and did not tell him the rights he was giving up. The state post-conviction court rejected both claims, finding that Sanchez' translation had been "correc[t], ful[l], and accurat[e]." J.A. 51.

On federal habeas, the Ninth Circuit recognized the dual nature of respondent's factual claims. *Tamayo-Reyes v. Keeney*, 926 F.2d 1492, 1494 (9th Cir. 1991). It explained: "The first [claim] is that Sanchez did not translate adequately the mens rea element of manslaughter. The second is that Sanchez did not translate adequately the plea form and plea proceeding." *Ibid.* The court held that respondent was entitled to an evidentiary hearing on the first issue. *Id.*, at 1502. It concluded, however, that the state court finding on the second issue — that Sanchez correctly and accurately translated the plea petition and the plea proceedings — was binding. *Ibid.* It thus affirmed the district court's judgment in part and reversed and remanded in part. *Ibid.*

Because of the Ninth Circuit's partial affirmance of the district court, certain facts are now a given. Specifically, it is settled that Sanchez correctly and completely translated the rights explained in the plea petition, that he accurately translated the state trial court's careful recitation of the rights respondent was giving up, that he properly translated the plea proceedings, and that respondent understood that pleading no-contest meant he was effectively pleading guilty and there would be no jury trial. If

respondent wanted to quarrel with these factual determinations, it was incumbent upon him to cross-petition from the Ninth Circuit's judgment. *Trans World Airlines v. Thurston*, 469 U.S. 111, 119 n. 14 (1985); *FEA v. Algonquin SNG*, 426 U.S. 548, 560 n. 11 (1976). Because he did not, the facts are settled contrary to the lengthy recitations and conclusions set forth in his brief.

B. The Accuracy of the Interpreter's Translation of the *Mens Rea* Element of the Crime Is Not To Be Decided Now.

What does remain at least arguably open is the first, much narrower factual issue the Ninth Circuit noted: whether Sanchez "translate[d] adequately the mens rea element of manslaughter." It is open only to the extent that a further evidentiary hearing may be required to answer the question, however. If a further hearing is required (and that is the issue to be resolved here), the district court will have to decide the factual dispute on the basis of the evidence adduced at that hearing. Respondent's brief, however, treats the factual question as if this Court should decide it or perhaps even consider it resolved.[2] The only issue to be resolved now, however, is whether the Ninth Circuit correctly ordered a new evidentiary hearing so that respondent could

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[2]The brief asserts quite confidently that Sanchez' Spanish is "gibberish." Resp. Br. 8. Respondent, however, never testified that Sanchez' Spanish was unintelligible, and the post-conviction transcript is replete with statements that respondent understood what Sanchez said to him. J.A. 23, 24, 31, 32. Indeed, much of the "evidence" on which respondent's brief bases its criticism of Sanchez' Spanish has never been offered at trial, tested by cross-examination or counter testimony, or ruled on by a trier of fact. Indeed, if it were as clear as respondent's brief assumes that Sanchez failed to translate the mens rea element of manslaughter correctly, then it is puzzling how respondent can claim his state post-conviction counsel failed to develop the record sufficiently or that a further record is needed.

develop facts on this point which he did not present to the state court.

C. The Record Does Not Establish Respondent's Innocence.

Respondent devotes portions of his brief to the suggestion that he is either altogether innocent of wrongdoing, or he at least has valid defenses to his criminal charges. He argues, for example, that "this case . . . involves a habeas petitioner who may well be innocent." Resp. Br. 55. Whether a prisoner is guilty or innocent is always an important question, but the record provides no basis to doubt respondent's guilt.

There is no dispute that respondent stabbed and killed the victim, J.A. 26, and respondent's suggestion that alcohol may have impaired his intent or that he may have a claim of self-defense finds no support in the record. On intent, respondent's trial attorney stated: "[T]here was no intention on [respondent's] part *at least up until the time he turned around with that knife* to kill anybody, and I think that the facts are sufficiently in doubt to award this plea, that of manslaughter." Jan. 22, 1985 Tr. 4 (emphasis added). Far from suggesting an insufficient mental state to establish manslaughter, the record reveals the only question was whether respondent's intent was sufficiently in doubt to justify a plea to anything less than murder. Moreover, there has never been any claim in state court that respondent was too intoxicated to possess the requisite mental state for manslaughter, nor any claim that his trial counsel was ineffective for failing to raise this issue.

On the suggestion of self-defense, the record reveals that this was "a situation where the [v]ictim was just trying to be a good Samaritan in trying to break up a violent situation [between respondent and his fiancée], and he ended up paying the ultimate price with his life." Jan. 22, 1985 Tr. 9. It is difficult to see how

stabbing the good Samaritan constituted self-defense.[3] But even if it did, respondent never asserted a claim of self-defense in state court, nor has he ever claimed that his trial counsel was inadequate for not doing so. Neither the record nor the claims asserted in this litigation suggest, as respondent's brief now does, that this is a case in which respondent "may well be factually innocent."[4] Resp. Br. 55.

D. Whether Post-conviction Trial Counsel's Performance Establishes "Cause" Is Not at Issue.

At least twice in his brief, respondent argues that his state post-conviction counsel was incompetent for not developing a better record and that even under a "cause and prejudice" standard, he would be entitled to a new evidentiary hearing because his attorney's performance constitutes cause. Resp. Br. 47-48 n. 22, 55. In doing so, he urges this Court to reexamine its decision in *Coleman v. Thompson*, ___ U.S. ___, 111 S. Ct. 2546, 2566-67 (1991) (incompetence of post-conviction counsel does not constitute "cause"), or at least to distinguish it. Not only does he ask the Court to decide an issue not encompassed in the question presented, but his claim is premature.

As the State urged in its opening brief, the proper disposition of this case is to remand it to the lower courts so that they may

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[3]Respondent's trial counsel never mentioned any fact that would suggest a self-defense claim. The prosecutor explained that respondent turned his anger on the victim, who was holding a small chair as he tried to break up the knife fight between respondent and his fiancée. Jan. 22, 1985 Tr. 8. The reference to a small chair is the only conceivable factual basis respondent has for thinking a self-defense claim might exist. The prosecutor's later description of the victim as the Good Samaritan, however, undercuts that possibility, and no self-defense claim was ever made in state court.

[4]Moreover, if he is innocent, that claim would be an exception to the ordinary requirement of cause and prejudice. *McCleskey v. Zant*, ___ U.S. ___ 111 S. Ct. 1454, 1470 (1991); *Murray v. Carrier*, 477 U.S. 478, 485 (1986).

apply the correct standard in the first instance. Because the correct standard for granting a new evidentiary hearing was unsettled at the time petitioner filed his habeas petition, it may be that he relied on the more generous "deliberate by-pass" test and did not come forward with evidence that would establish cause. Pet. Br. 21. The decision in *Coleman* may pose difficulties for respondent in satisfying the "cause" prong of the test if the only reason for his by-pass was his counsel's performance. Because this question involves facts not yet developed, it is best left to the lower courts.

II.

Respondent's arguments focus more precisely on the question before the Court once he begins to address 28 U.S.C. section 2254(d) and the case law relevant to the "deliberate by-pass" and "cause and prejudice" standards. Ultimately, however, respondent fails to support his view of what the statute requires, and he is unable to explain persuasively why deliberate by-pass should be preserved in this context when it has proven so unsatisfactory in all others.

A. History Does Not Compel the Deliberate By-Pass Standard in Order Properly to Preserve Federal Court Habeas Power.

Respondent begins his argument with an overview of 100 years of statutory development and case law which, he asserts, establishes the integral role of evidentiary hearings in federal habeas. Respondent's statutory discussion begs the question. The fact that the statutes vest federal courts with power to hold evidentiary hearings or set out procedures for doing so says nothing about when hearings are required — which is the question presented by this case. On this point, even the decision in *Townsend v. Sain*, 372 U.S. 293, 318 (1963), acknowledged that while a federal court has the power to hold evidentiary

hearings, it "may, and ordinarily should accept the facts" found by the state court.

Similarly, the 100 years of case law respondent cites does not demonstrate that evidentiary hearings are an integral part of the process when the petitioner had a full and fair opportunity to develop the facts in state court. Respondent relies on seven cases that were decided before *Townsend*. Three of them involve habeas petitioners seeking review of federal convictions.[5] Because federal habeas was the first opportunity these petitioners had to establish the facts relevant to their constitutional claims, these cases have no bearing on the role evidentiary hearings should play when a state prisoner had a full and fair opportunity to develop the facts in state court. Two cases respondent cites address the availability of habeas relief for petitioners who claimed that mob violence rendered their state hearings a farce.[6] Recognition of the role federal evidentiary hearings play in these circumstances does not suggest that they play the same role elsewhere. One case respondent cites was on direct review from the Nebraska Supreme Court.[7] It says nothing about the right to a federal evidentiary hearing, much less the relation between federal hearings and state fact findings.

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[5] In *Walker v. Johnston*, 312 U.S. 275 (1941), the petitioner challenged his federal conviction claiming that his waiver of counsel was involuntary. In *Ex Parte Cuddy*, 131 U.S. 280 (1889), the petitioner challenged his federal conviction for contempt claiming that the district court had lacked jurisdiction. In *Wong Doo v. United States*, 265 U.S. 239 (1924), the petitioner challenged his detention by the Immigration and Naturalization Service.

[6] *See Moore v. Dempsey*, 261 U.S. 86, 92 (1923); *Frank v. Mangum*, 237 U.S. 309 (1915).

[7] *Hawk v. Olson*, 326 U.S. 271 (1945).

Only one of respondent's seven authorities, *Brown v. Allen*, 344 U.S. 443 (1953), discusses when a state prisoner who had a full and fair opportunity to develop the facts in state court is entitled to a federal evidentiary hearing. As respondent observes, *Brown* recognized that 28 U.S.C. section 2243 provides that "[a] federal judge on a habeas corpus application is required 'to summarily hear and determine the facts.'" *Id.*, at 462 (quoting section 2243). But respondent fails to note that immediately after quoting section 2243, *Brown* explains that this provision does not require a federal court to hold new evidentiary hearings if it "is satisfied, by the record, that the state process has given fair consideration to the issues." *Ibid.* As Justice Frankfurter's concurring opinion recognized, when the federal constitutional issue turns on a factual dispute, a district court may accept the state court fact finding "[u]nless a vital flaw be found in the process of ascertaining such facts." *Id.*, at 506-507.

B. Congress Did Not Adopt *Townsend*'s Deliberate By-Pass Test.

Respondent more closely joins issues with the State when he maintains that Congress adopted *Townsend*'s deliberate by-pass standard, thereby codifying *Townsend*'s holding and precluding further judicial refinement in this area. Although respondent relies primarily on the 1966 amendments to 28 U.S.C. section 2254, he points to nothing in the language Congress added that expressly codifies the deliberate by-pass standard or even obliquely refers to it. He cannot find anything in the legislative history to show that Congress specifically intended to ratify *Townsend*'s use of the deliberate by-pass standard or indeed even discussed it. And he never explains how the deliberate by-pass standard is consistent with the underlying purpose of section

2254(d), which is to reduce the friction between state and federal courts. *See Sumner v. Mata*, 449 U.S. 539, 550 (1981).

Respondent's argument rests on one point: Congress used some of the general criteria stated in *Townsend* when it fashioned criteria for section 2254(d). From this, respondent infers a conclusive congressional intent to codify *Townsend*'s use of the deliberate by-pass standard as well. The Court, however, rejected a comparable argument in *McCleskey v. Zant*, ___ U.S.___, 111 S. Ct. 1454 (1991).

At issue in *McCleskey* was whether the 1966 amendment to 28 U.S.C. section 2244 codified the Court's application of the deliberate by-pass standard to successive habeas petitions in *Sanders v. United States*, 373 U.S. 1 (1963). Section 2244, as amended in 1966, provides that a successive petition need not be entertained if a federal court concludes that the applicant has "on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ." Although the phrase "deliberately withheld" could have been read as codifying *Sanders*' use of the deliberate by-pass standard, the *McCleskey* Court insisted on a clearer expression of congressional intent before drawing such an inference. 111 S. Ct., at 1466. Such a reading of the statute would both unnecessarily limit the "complex and evolving" body of law relevant to successive claims, and it would alter the cooperative role the Court has played in implementing the habeas statutes. *Id.*, at 1467.

Respondent asks the Court to make a broader interpretative leap than the Court declined to make in *McCleskey*. Although the language of section 2244 referred to "deliberately with[o]ld[ing]" claims, nothing in the language of section 2254(d) provides any basis for inferring that Congress meant to approve or ratify the deliberate by-pass standard in *Townsend*. Moreover, unlike the

1966 amendment to the statute in *McCleskey*, the legislative history of section 2254(d) provides some guidance on Congress' intent. The only direct explanation of section 2254(d) comes from the report prepared by the Committee on Habeas Corpus of the Judicial Conference of the United States. The portion of the report that explains section 2254(d) focuses on deference to state court fact finding. H.R. Rep. No. 1384, 88th Cong. 2d Sess., 23-25 (1964). Only one reference to *Townsend* occurs in the explanation of section 2254(d). The report quotes *Townsend* for the proposition that the duty of a federal court on habeas to scrutinize the state court record "is no less exacting" than the Supreme Court's duty to review the state court record on direct review. *Id.*, at 24. This single reference to *Townsend* hardly suggests that Congress intended to ratify the deliberate by-pass standard. Rather, it cuts against it. It emphasizes that the state court record should play a particularly important role in the federal review and likens that review to an appellate procedure rather than a de novo trial.[8]

Respondent advances several arguments in an effort to circumvent these weaknesses in his theory. He questions the validity of the 1964 report because the 1966 version of the bill

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[8]*McCleskey* also noted that *Sanders* referred to a passage from *Townsend* that discussed "inexcusable neglect." 111 S.Ct., at 1467. *McCleskey* concluded that *Sanders* had not intended to make deliberate by-pass the sole criterion for abuse of the writ and explained that *Sanders*' reference to inexcusable neglect was best understood as adopting a cause and prejudice standard. *Id.*, at 1467-68. The passage from *Townsend* to which *Sanders* referred (and which *McCleskey* interpreted) was the passage explaining when the failure to develop material facts adequately in state court will entitle a habeas petitioner to a federal evidentiary hearing. *See* 111 S. Ct., at 1467 (citing *Townsend v. Sain*, 372 U.S., at 317). *McCleskey*'s gloss on *Sanders*' and *Townsend*'s use of "inexcusable neglect" demonstrates that even if the 1966 Congress meant to codify the reasoning in *Townsend*, as respondent argues, it does not follow that Congress meant to preclude the use of a cause and prejudice standard.

added a subsection, which is now codified as section 2254(d)(8). That change proves little. The subsection in question here, which provides that there is no presumption of correctness if material facts were not adequately developed, remained the same. Moreover, the issue governed by subsection (d)(8) — whether the state court's factual findings are fairly supported by the facts *already* in the record — goes to errors in the state court's conclusions, not to a petitioner's failure to take advantage of state court proceedings. That change does not logically bear on Congress' intent here.

Next, respondent argues that the 1964 report reveals that the Habeas Committee rejected the interpretation the State now advances. What the report shows, however, is that the committee rejected amendments that would have made state fact findings conclusive in federal habeas regardless whether the state court hearing complied with due process or provided a full and fair opportunity to litigate the facts.[9] The State has never suggested that this is the proper rule. Rather, the State's argument has always been directed to the standard that should apply when a

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[9]The 1964 Committee report noted that two state organizations had requested certain amendments to the bill. It explained:

> Illustrative of the proposed amendments was one which would make the finding of fact of a State court conclusive in a proceeding in habeas corpus in a Federal court, even though the State court did not have jurisdiction of the person in the State court proceeding wherein such finding was made or did not accord the prisoner a full or fair hearing in such proceeding or otherwise denied him due process of law.

H.R. Rep. No. 1384, 88th Cong., 2d Sess., 22 (1964). On the next page, the report noted that if a habeas bill were introduced in the 1964 Congress, it was "reasonably certain an amendment with respect to the effect to be given to State court factual determinations . . . will be urged by the State organizations referred to above." *Id.*, at 23. It then explained that "Of course, an amendment such as proposed to our Committee by the representatives of such State organizations, as stated above, would be wholly incompatible with the duty of Federal courts to determine Federal constitutional questions." *Ibid.*

habeas petitioner has had a full and fair opportunity to develop facts in state court.

Respondent further attempts to avoid the Court's decision in *McCleskey v. Zant* by arguing that it has little bearing on determining Congress's intent here. He urges that *McCleskey* found that cause and prejudice was consistent with the decisions that preceded *Fay*,[10] while here, application of cause and prejudice to evidentiary hearings would "repudiate long standing law," a point he thinks the State concedes. Resp. Br. 33. Respondent misperceives both judicial history and the State's position. As the State pointed out in its opening brief, adoption of the cause and prejudice standard would return the analysis to the rule in *Brown* that a federal evidentiary hearing is required only where good cause exists for the petitioner's failure to develop facts in state court or, as Justice Frankfurter put it, where there was "a vital flaw" in the state processes. *Brown v. Allen*, 344 U.S., at 506.

Finally, respondent argues that *McCleskey*'s reasoning is limited to situations where the Court has taken an active role in defining the procedures for habeas. He asserts that "Congress has taken the lead role in defining when evidentiary hearings should be held in habeas corpus actions," thus divesting the Court of any power to continue to refine judicial precedents in this area. Resp. Br. 34. Respondent's view of Congress' "lead" role is mistaken. Development of the law in this area began with decisions announced by this Court. In 1952, the Court explained in *Brown v. Allen* when evidentiary hearing are required. The Court's articulation of the relevant principles continued in 1963, when the Court laid down broad guidelines in *Townsend*. While

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[10]*Fay v. Noia*, 372 U.S. 391 (1963).

Congress entered this area when it adopted section 2254(d), nothing in the language of the statute preempts the Court's role in advancing Congress' purpose of minimizing friction between the state and federal courts. In short, *McCleskey*'s conclusion that a court should be hesitant to assume that Congress has foreclosed judicial development in habeas corpus applies with equal if not greater force here.

C. Both Precedent and Policy Support Adopting the Cause and Prejudice Test in this Case.

Respondent recognizes that if he is wrong and Congress has not adopted the "deliberate by-pass" test, then he must confront this Court's decisions applying the cause and prejudice standard. He attempts to distinguish these cases by means of two related but separate arguments: First, he urges that this case differs from the cases employing the cause and prejudice standard because they all involved "violations of a state's procedural rules," a situation he assumes does not exist here. Resp. Br. 37. Second, he argues that cause and prejudice applies only when an adequate and independent state ground exists to preclude federal review. He maintains that when independent and adequate state grounds do not exist, principles of comity and federalism weigh less heavily. Resp. Br. 42.

The assumption underlying respondent's first argument — that no Oregon procedural rule requires a litigant to present all relevant evidence at a single state hearing — is simply incorrect. Few rules of procedure are more basic than the requirement that a litigant bring forth all his evidence at one hearing. In Oregon, this interest in efficient, full, and final hearings is expressed by several state procedural rules. Those rules narrowly limit the circumstances in which a criminal defendant can seek to introduce evidence he or she did not offer initially. Or. R. Civ. P. 64

(new trial may be granted for newly discovered evidence that could not have reasonably been discovered by trial); *see* Or. Rev. Stat. § 136.535(4) (same rule applicable to criminal proceedings). The same limits apply to a state post-conviction petitioner's ability to reopen the proceeding to submit evidence after the post-conviction hearing has concluded. *See* Or. R. Civ. P. 64. Finally, Oregon statutes limit a state prisoner to only one post-conviction proceeding, thus providing a strong incentive to present all issues and evidence at a single hearing. *See* Or. Rev. Stat. § 138.550(3).[11]

Respondent's second argument — that the cause and prejudice standard is squarely rooted in, and limited to, circumstances involving "adequate and independent state grounds" that would bar federal review — is wrong, too. The genesis of the cause and prejudice standard is not in the "independent and adequate state ground" doctrine at all. Rather, it is in the recognition that procedural rules often serve important state interests that should temper a federal court's otherwise unbounded power to reach a habeas petitioner's federal claims. To be sure, some of the "cause and prejudice" cases have involved claims that would have been barred on direct review by the "adequate and independent state ground" doctrine, and the Court has recognized that reaching those claims in federal habeas raises questions of comity

[11]State law does not permit a second post-conviction challenge to a criminal conviction unless the grounds for relief could not reasonably have been asserted in the first post-conviction proceeding. *Martz v. Maass*, ___ Or. App. ___, ___ P.2d ___ (Dec. 26, 1991); *Dotta v. Maass*, 91 Or. App. 222, 224, 754 P.2d 36, *rev. denied* 306 Or. 413, 761 P.2d 531 (1988). These decisions express the State's interest in requiring state prisoners to litigate fully and at the first opportunity any challenge to their convictions. Similar appellate rules do not permit parties to go beyond the record created at the trial level. *State v. Rodinsky*, 60 Or. App. 193, 197, 653 P.2d 551 (1982); *State v. Rutledge*, 2 Or. App. 374, 376-77, 468 P.2d 913 (1970).

and federalism. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 81-82 (1977). But to suggest, as respondent does, that the cause and prejudice test is somehow limited to this context ignores the real basis for decision in these cases, and it overlooks decisions applying cause and prejudice in circumstances that have not involved state prisoners or adequate and independent procedural grounds at all.

The cause and prejudice standard was first articulated in *Davis v. United States*, 411 U.S. 233 (1973). There, a federal prisoner had failed to raise a jury selection challenge in his federal trial, contrary to a federal rule of procedure that declared the claim was waived if not timely raised. The Court held that the issue could not be asserted as a ground for federal habeas relief unless petitioner could show "cause and prejudice" for the waiver. The Court adopted this standard because of the need to accommodate the federal judiciary's interests in having claims litigated at the first full and fair opportunity for doing so. *Id.*, at 241-42.

That same rationale has guided the Court in extending the cause and prejudice test to other contexts. In *Francis v. Henderson*, 425 U.S. 536 (1976), for example, the Court was faced with a state prisoner who failed to raise a jury challenge at trial, but sought to do so in his habeas petition. The Court applied the cause and prejudice test from *Davis* not because the state ground provided an independent basis for the judgment but because it served "considerations of comity and concerns for the orderly administration of criminal justice." *Id.*, at 538-39. Moreover, the Court could find no reason "to give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants," a point that directly refutes respondent's suggestion that cause and prejudice is

somehow limited to state procedural defaults that would serve as jurisdictional bars to direct review. *Id.*, at 538-39 and 542. Similarly, the Court has applied the cause and prejudice test where a habeas petitioner seeks to present a claim that he did not present to the state appellate courts, *Coleman v. Thompson*, *supra*, and where he failed to present a claim to a federal district court in an initial petition for habeas relief, *McCleskey v. Zant*, *supra*. Each time, the Court has reasoned that the habeas petitioner had an opportunity to raise the claim and to have it decided in an earlier state or federal hearing; and each time, the Court concluded that cause and prejudice is the correct test for the default because a more lenient standard would show too little respect for the initial forum's interest in providing a complete and final resolution of the petitioner's federal claims. *See Coleman v. Thompson*, 111 S. Ct., at 2563-65; *McCleskey v. Zant*, 111 S. Ct., at 1468-70.

Respondent's sole citation to authority in support of his argument is unavailing. He argues that *Vasquez v. Hillery*, 474 U.S. 254 (1986), demonstrates that if a claim has been at least minimally preserved in state court, a federal court may always hold an evidentiary hearing to develop additional facts. Resp. Br. 53-54. Respondent is wrong. The issue in *Vasquez* was exhaustion, not whether a federal evidentiary hearing should be held. No one disputed that the petitioner[12] in *Vasquez* had "not [been] given a full and fair hearing on his discriminatory [jury selection] claim in state court," 474 U.S., at 267 (O'Connor, J., concurring in the judgment), and that a new evidentiary hearing in federal

[12]Although the state prisoner, Booker Hillery, was the respondent in the Supreme Court, he is referred to as the habeas petitioner or the petitioner.

court was required.[13] The only question was whether the exhaustion doctrine required the petitioner to return to state court before offering new evidence. Not only was the right to a federal evidentiary hearing not at issue in *Vasquez*, but the State has never disputed in this litigation that respondent would be entitled to a federal evidentiary hearing if he, like the petitioner in *Vasquez*, had been denied a fair opportunity to develop the facts in state court.

Finally, respondent argues that because he at least raised his claim in state court, even if he did not present any real evidence on it, the federalism and comity interests at stake are significantly diminished. He never explains how that is so, nor does the suggestion withstand scrutiny.

As much as respondent would like to distinguish a failure to raise a claim at all in a prior hearing from a failure to present the prior forum with all evidence that bears on the claim, the interests at stake are the same. In the one case, the state court does not even know that the federal claim exists. In the other, the court is lead to believe a party has litigated it fully, when in fact he has not. In either circumstance, permitting the prisoner to resort to federal court for a new and more exhaustive trial "tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event." *Wainwright v. Sykes*, 433 U.S., at 90. In either circumstance, all issues which bear on a defendant's criminal charge are not being determined

[13]The state judge who decided the petitioner's discrimination claim was the same judge who selected the jurors. The district court found that the state judge was biased, that his factual findings should not be presumed correct, and that a federal evidentiary hearing was required. *See Hillery v. Pulley*, 563 F. Supp. 1228, 1235-36 (E.D. Cal. 1983). No one challenged this conclusion in either the Ninth Circuit or in this Court. *See Vasquez v. Hillery*, 474 U.S., at 267 (O'Connor, J., concurring in the judgment).

at the point at which "[s]ociety's resources have been concentrated . . . in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens." *Ibid.* And in either circumstance, fully making the record at the time of the state court prosecution brings benefits to both the state and federal systems: it enables the record to be made when recollection of witnesses and even physical evidence is freshest; it gives states a meaningful opportunity to fully vindicate federal interests in the first instance; it ensures a more complete record for later federal court review; it gives federal courts the benefit of fully-informed state court insights on the question; and it may result in an earlier resolution of a meritorious claim, thus sparing state and federal court resources alike, and contributing to finality of criminal litigation. *Id.*, at 88-89 (discussing policy considerations for cause and prejudice rule); *Coleman v. Thompson*, 111 S. Ct., at 2563-65 (same).

Respondent's only answer to this is to emphasize the importance of the federal habeas power, to press the significant interests of federal courts in vindicating federal constitutional rights free of the interference of state rules, and to urge that full evidentiary hearings are relatively rare now, and may be all but non-existent in the future. Resp. Br. 43-52. At bottom, however, his arguments challenge use of the cause and prejudice standard in any context, not simply in this one. Fundamentally, his quarrel is with the policies the Court has chosen to balance against concededly important federal interests. For good reason, however, the Court has recognized that the federal writ power, when it extends to state prisoners, invokes a delicate balance between the judicial branches of the coordinate state and federal governments. That the Court has tempered the use of federal habeas power in a way that carefully preserves the States' significant

role in their criminal justice systems is a wise accommodation of the multiple and often competing interests at stake.

CONCLUSION

For the reasons stated above and in petitioner's opening brief, the court of appeals' judgment should be reversed and remanded.

Respectfully submitted,

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